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No. 791

In the Supreme Court of the United States

OCTOBER TERM, 1959

FRED STERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 737

FRED STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A; A 3-10)[1] is reported at 271 F. 2d 895.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1959 (Pet. App. B; A 11). A pe-

[1] "A" designates the separately paginated volume containing the proceedings in the court of appeals. "P.T." refers to the one volume pre-trial proceedings. "T" denotes the 4-volume trial transcript.

tition for rehearing was denied on December 29, 1959 (A 12). On January 18, 1960, Mr. Justice Douglas extended the time for the filing of a petition for a writ of certiorari to and including February 27, 1960. The petition was filed on February 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied the effective assistance of counsel.

STATEMENT

On March 5, 1958, a six-count indictment was returned in the United States District Court for the Southern District of California, charging that petitioner engaged in a narcotics conspiracy from January 1956 until July 1957 (count 1),[2] and that, during 1956 and 1957, he committed substantive narcotic offenses in violation of 21 U.S.C. 174 (Counts 2-6) (P.T. 1-6).

After a jury trial, petitioner was convicted on counts 1, 3, 4, 5 and 6 (T 637-638).[3] He was sentenced, as a subsequent narcotics offender (T 647-648), to a total of 50 years imprisonment:—20 years on count 1, 20 years on count 3, to run concurrently

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[2] Quentin Browning, Clarence Winfrey and Cele e Winfrey were named, but not indicted, as co-conspirators (P.T. 1-3).

[3] On motion of petitioner's counsel, count 2 was dismissed by the trial court at the close of the government's case (T 349-350).

with the sentence imposed on count 1, and 10 year consecutive sentences on counts 4, 5 and 6 (T. 651). The Court of Appeals unanimously affirmed (A 3-10).

The Pre-Trial Proceedings:

On Tuesday, September 16, 1958, the date for petitioner's trial, Mr. Paul Sweeney, appearing as his counsel, moved for a continuance, asserting that, about two weeks before, he had been arrested on the "State side" on a "bribery incident", and that he had informed the petitioner that, because of this, he was not in a proper state of mind to represent him (T 7). Observing that counsel had been arrested "long enough ago" so that a change of counsel "should have been made by this time", that the case had been pending since March 4, 1958, that counsel had represented petitioner since April 28, 1958, and that, if granted, this would be the fourth continuance, the court denied the motion (T 7-11). A jury was then empanelled (T 11-53), with Mr. Sweeney taking active part, inquiring for cause on two occasions (T 36, 41), and excusing four jurors peremptorily (T 39, 41, 44, 46).

Following the government's opening argument (T 54-60), there was further discussion, outside the presence of the jury, concerning the request for a continuance. The trial judge first noted that Mr. Sweeney had appeared for petitioner on March 10, 1958 (five days after the indictment was filed), and that, although a formal written notice of appearance had been filed for petitioner by Harry Weiss on April 7, 1958. Mr. Sweeney, since April 28, had appeared

for petitioner "in all matters" (T 60-61).[4] The court then questioned petitioner as to whether Mr. Sweeney made prior appearances in his behalf, whether Mr. Weiss was still his attorney, whether he had discharged Mr. Sweeney, and whether he had obtained other counsel. Petitioner stated that he had authorized Mr. Sweeney to appear for him on prior occasions, that Harry Weiss "stepped out" when Mr.

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[4] The history of the pre-trial proceedings prior to September 16, 1958 are as follows:

(1) On March 10, 1956, the case was placed on the calendar and petitioner was arraigned. He was represented by Paul Sweeney, who was granted a continuance until March 24, 1958, for the plea (P.T. 10).

(2) On March 24, 1958, Arthur Sherman appeared as counsel for petitioner and the cause was continued until April 7, 1958 (P.T. 13).

(3) On April 3, 1958, a motion for reduction of petitioner's bail was heard and granted. Paul Sweeney appeared as counsel (P.T. 14).

(4) On April 7, 1958, Harry Weiss appeared for petitioner and the cause was continued until April 21, 1958 (P.T. 16). On April 7, Mr. Weiss had filed a formal notice of appearance. (P.T. 15).

(5) On April 15, 1958, a motion for a bill of particulars was filed in behalf of petitioner by Arthur Sherman (P.T. 17-20).

(6) On April 28, 1958, petitioner, represented by Paul Sweeney, entered a plea of not guilty to all the counts, and the motion for the bill of particulars was withdrawn. The cause was set for trial on June 17, 1958 (P.T. 33).

(7) On June 17, 1958, Paul Sweeney appeared for petitioner, and on his motion a continuance was granted and jury trial was set for August 12, 1958 (P.T. 34).

(8) On August 12, 1958, Paul Sweeney again appeared for petitioner and secured a continuance in the trial until September 16, 1958 (T 63).

Sweeney made his first appearance, and that, although he "discussed it" with Mr. Sweeney, he had not discharged him. Petitioner further stated that, when Mr. Sweeney told him "he wasn't capable, in view of his troubles," he had spoken to some other people about obtaining another attorney (T 62-64). The following colloquy then occurred (T 64):

The Court: Have you told Mr. Sweeney all the facts in this case?

The Defendant: Yes, sir.

The Court: He has advised you of the law and as to your rights?

The Defendant: Yes.

The Court: I have here an appearance designation of counsel. Now do you refuse to sign it?

The Defendant: (Pause)

The Court: Do you refuse to sign designating Mr. Sweeney as your lawyer?

The Defendant: Yes.

The Court: You do or do not?

The Defendant: I will sign it.

At this point, Mr. Sweeney stated that he did not know whether petitioner should obtain other counsel or not, and the court declared a short recess so that petitioner might decide whether he wanted Mr. Sweeney as his lawyer (T 65-66). Shortly after this recess, the jury having retired, the court again questioned petitioner as to the status of Harry Weiss in the case. When told that he was one of petitioner's lawyers, the court stated that he would call Mr. Weiss and "get him over here" (T 66); and that he would send a United States Marshal for him, because

he had the feeling that Mr. Weiss was "playing horse with the courts".[5] (T 66-67). Mr. Sweeney then observed that Mr. Weiss had told him on the previous Friday that he did not think he would appear. He further stated: "I think Mr. Stein has been satisfied with my services thus far and is confident to have me continue. But it was just my personal feeling in light of my own situation that just made me wonder whether I would be best at this particular time to try what I think was a very important thing in his life with my own troubles as they are" (T. 67). The court then observed it was up to the petitioner to "make up his mind" (T. 67). The following discussion then occurred (T 68):

The Court: * * * I want to know now from Mr. Stein who your lawyer is.

The Defendant: Mr. Sweeney.

The Court: Mr. Sweeney is your lawyer?

The Defendant: Yes, sir.

* * * *

The Court: * * * Do you wish Mr. Sweeney to be substituted in place and stead of Harry Weiss?

The Defendant: Yes, sir.

The Court: Very well. The motion is granted and Mr. Sweeney is substituted as sole counsel for the defendant Stein.

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[5] As explained by the trial judge, he had particular reference to a prior case in which Mr. Weiss' office represented a defendant, before three judges, in a six-day trial. After conviction, when it came time to impose sentence, the defendant said that Weiss was not his lawyer and that he had never retained him (T 67-68).

The Government's Evidence:

1. In early January 1956, "Duke" Browning, who had become acquainted with petitioner in 1948 at McNeil Island Penitentiary while they were both incarcerated there on narcotic convictions (T 70, 132, 140-141, 410-411, 451-452), contacted petitioner, in Los Angeles, advised him that he had a client for heroin, and asked if he could purchase some (T 70-72). Petitioner told Browning that if he had the money he could go East and get a "kilo" of heroin (approximately 35 ounces). After a number of meetings between the two, it was agreed that Browning would give petitioner $5,000 ($3,000 of which he had obtained from a prospective purchaser), and, with another $2,000 that petitioner had borrowed, petitioner would go East and obtain the heroin (T 71-76, 133-139). They further agreed to put the heroin so obtained in a "pool" and distribute it as partners, with Browning acting as the contact man (T 77-78). Browning next saw petitioner, about 10 days later (approximately January 17 or 18, 1956), and was told that the trip had been successful and petitioner would have the package the next day (T. 79).[6] The next evening, Browning went to a motel room rented by petitioner and was shown the "merchandise". Petitioner told him that it would "test out close to 90%" pure heroin (T 80, 84, 86). The two men then proceeded to spend the rest of the night "cutting"[7] a

[6] Petitioner thereafter told Browning that he had obtained the heroin in New York (T 139).

[7] A process in which the heroin is diluted by adding milk sugar to it (T 81, 86).

quarter of the "kilo". According to Browning, petitioner was not satisfied to cut it "one for one", because he did not think that their customers were entitled to such a grade for the price they had agreed to sell it for. They therefore cut it further, placed the heroin into one ounce packages and then into glassine bags. When they had finished, their yield was approximately 20 one-ounce packages of heroin from the quarter of a "kilo" cut (T 80, 84-87). They agreed that each one-ounce package was to sell for $350 (T 92).

During the time that petitioner had been absent from Los Angeles, Browning had contacted Clarence Winfrey and informed him that he knew of something Winfrey might be interested in and would know for certain "in a few days" (T 90, 190-193). The night that petitioner returned, Browning contacted Winfrey again and was told that the latter was interested but was short of money (T 90, 193-194). At the meeting at the motel, Browning advised petitioner of Winfrey's interest, and, after they "pro and conned it", they agreed to let him have three ounces at $350 per ounce, one ounce to be paid for immediately and the balance of $700 to be paid when Winfrey sold the merchandise (T 90-93, 95, 103). Browning also informed petitioner that he had another customer for 10 "pieces" of "stuff",[8] who had $3,000 he wanted to spend. The next day,

[8] In the vernacular of the narcotics traffic, "piece" means an ounce and "stuff" means heroin (T 93-94).

Browning sold the 10 "pieces" for $3,000, as he and petitioner had agreed. (T 93-94, 96-97).[9]

On the same day (about January 19, 1956), Browning delivered three "pieces" to Winfrey at his home, for which he received $350 in cash (Count 3). (T 96, 111, 181, 195-196, 198). Winfrey testified to the receipt of the heroin, and testified further that after he cut the three ounces "[n]ot quite 50 per cent" with milk sugar, he sold it at $200 per ounce (T 196-197, 199).

Thereafter, Browning returned to San Francisco and next saw petitioner some time in February to pick up 12 "pieces" of heroin for another customer (T 104-109).[10] In the latter part of February, Browning and petitioner cut another quarter of the "kilo" (T 109). Browning testified that, during the months of January through April, he sold about 51 ounces of heroin that he had obtained from petitioner (T 109-111), and that they shared about $10,000 to $12,000 from these sales. (T 111-112). In May of 1956, they terminated their partnership, shared the profits and split up the remaining half "kilo" which had not yet been sold (T 110, 112, 115-118, 121-122). Some time in early September 1956, after the termi-

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[9] Browning had received the $3,000 from his customer before petitioner had left to get the heroin, and had given him $1700 or $1800 of it as part of the investment to purchase the "kilo" (T 98-99).

[10] As Browning explained it, since petitioner kept "the plant"—the balance of the heroin—whenever he needed some he would contact him (T 104-105).

nation of the partnership, Browning purchased 5 "pieces" of heroin from petitioner (Count 5; T 124).

Following Browning's arrest in San Francisco on a federal narcotics charge in late 1956 (T 147, 151),[11] he informed the federal authorities that he had been getting the heroin from petitioner (T 148, 156), and advised them that he was planning to return to Los Angeles to buy narcotics from him (T 148). In late November or early December 1956, with $1800 in federally provided funds, Browning contacted petitioner and attempted to make a purchase. This deal fell through, however, after a number of meetings between the two men (T 122-132). These meetings took place under the surveillance of federal narcotic agents (See T 295-310, 490-501).

2. Shortly after the first sale to Winfrey in January 1956, it was arranged that petitioner would furnish him heroin directly (T 102, 118-119, 181-182, 200-202)[12]. According to Winfrey, starting some time in February 1956 (Count 4) until the end of that year, he purchased "stuff" from petitioner on about 10 different occasions. The amount of each purchase was approximately 3 ounces at $350 per

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[11] Browning thought he was arrested some time in late September or early October (T 151, 159), but James H. Mulgannon, an agent of the Bureau of Narcotics, stated that Browning was arrested on or about November 25, 1956 (T 359-360).

[12] On direct examination Winfrey stated that he had given petitioner the $700 owing on his January sale (T 205). On cross-examination, he stated that he was not certain whether he gave it to petitioner or petitioner's brother (T 234-235; see also T 254-255).

ounce (T 207-214, 215-216). Petitioner made delivery at various streets in Los Angeles (T 211-212, 217). At all of these deliveries, the "merchandise" in a white cellophane bag was handed to Winfrey's wife, who had accompanied him (T 217-218; see testimony of Celeste Winfrey, T 259-262). Similarly, on various dates in January and February 1957, and again on March 3, 1957 (Count 6), Winfrey purchased "stuff" from petitioner with the same arrangements as to amount, price and mode of delivery (T 220-223, 262). Winfrey stated that he resold the "stuff" at $200 an ounce, after "cutting" it with milk sugar (T 216-217).

On March 12, 1957, Mrs. Winfrey was arrested on a federal narcotics charge (T 223, 263-264, 357). After talking to federal narcotic agents, Winfrey spoke to petitioner about making another purchase of narcotics. He then had somewhat over $3,000, $2,100 of which was given him by the federal agents (T 224-225). He thereafter met with petitioner and discussed the possibility of a purchase (T 225-226). Petitioner, who knew of Mrs. Winfrey' arrest, asked why Winfrey had not told him of it, and informed Winfrey that he would let him know later about the narcotics (T 226). Winfrey spoke to petitioner on several occasions and was told to wait (T 226). They met again in June and July 1957 but no sale was consummated (T 227-232).[13]

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[13] Federal narcotic agent William C. Gilkey testified that he had kept petitioner and Winfrey under surveillance during two meetings they had in July 1957 (T 283).

The Defense:

The defense of petitioner, developed by trial counsel Paul Sweeney, had two main facets. First, Mr. Sweeney sought to discredit the testimony of the main government witnesses (Browning and the Winfreys). Secondly, he attempted to establish an alibi for petitioner on counts 5 and 6.

1. To achieve the first aim, he tested on cross-examination the version of events given by each of these witnesses (*Browning*: T 134-141, 142-144, 154; *Clarence Winfrey*: T 233-241, 246-248; *Celeste Winfrey*: T 273-274). Also, he questioned them as to their prior dealings with federal narcotic agents in this case: whether charges had been lodged against them; why, if they knew, they had not yet been brought to trial for their participation in these offenses with petitioner; whether they had been promised immunity or had been coerced into testifying against petitioner—in short, whether they had testified against petitioner solely in order to protect themselves from prosecution (see, *e.g.*, T 146-153, 155-163, 165, 168-169, 281, 241, 250-252, 267-272).

On his direct case,[14] Mr. Sweeney further pursued this tactic by calling various law enforcement officers as witnesses. On such examination, he brought out

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[14] At the close of the government's case, Mr. Sweeney had moved to dismiss each count of the indictment (T 350-354). His motion was granted as to count 2 (T 350). Also, on his motion, the testimony of federal agents as to what they had heard of conversations between Winfrey and petitioner, transmitted by a microphone hidden on Winfrey's person, was stricken by the trial judge (T 324-327).

that no case had yet been presented to a grand jury in relation to Mrs. Winfrey or Browning (See T 356-358, 359-360).[15]

2. As for the defense of alibi on counts 5 and 6, counsel examined petitioner, his wife, and his wife's daughter. In substance, their testimony was that for part of September, 1956 petitioner was in New York City (Count 5) and that on March 3, 1957 petitioner and his wife were in Mexico to get married (Count 6) (T 366-377, 386, 401-407, 433-434, 438-441). A photostatic copy of a hotel registration card, which Sweeney had himself obtained in New York, and a Mexican marriage license were introduced into evidence (T 363-364, 378-380, 438).

Petitioner further testified that, though Browning had contacted him in January 1956 concerning narcotics, he had never obtained any or sold any to him (T 410-420, 429-432, 448). As for his dealings with Winfrey, who had also asked him for heroin (T 459, 463), petitioner denied that their numerous meetings had anything to do with heroin transactions or that he ever obtained any for him (T 418-422, 424-429, 448).

3. The day following the jury verdict, Mr. Sweeney made a motion for a new trial (T 642-645). One of the grounds asserted was that the "defendant was

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[15] In this same connection, counsel sought to elicit on his examination of petitioner that he had been "badgered" by the government and offered "various propositions" by federal law enforcement officers "if he would get certain people for them" (T 444-445, 484-486).

not granted a reasonable continuance in order to secure additional counsel" (T 645). After denying the motion, Judge Hall stated (T 646):

> In connection with your comment on the last reason, that the defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances, that the defendant was not granted a reasonable continuance in order for him to secure additional counsel, I have been a member of the bar since 1916, I have been on this bench since 1942, and I know of nothing that any other or additional counsel could have done that you, Mr. Sweeney, did not do in the protection of this defendant's rights.
>
> The case was tried skillfully and adroitly on behalf of the defendant by you, * * *.

ARGUMENT

Petitioner asserts that his trial counsel's emotional difficulties, stemming from counsel's involvement in a state narcotic charge[16] shortly before petitioner's trial, brings this case within the rule of *Glasser* v. *United States*, 315 U.S. 60, 70, which holds that effective assistance of counsel is denied where an attorney "simultaneously represent[s] conflicting interests" (Pet. 15-25). The rationale of *Glasser* has no application here. In that case, Glasser's personally retained counsel had been appointed by the trial judge to represent, in addition, one of the other co-

[16] The trial transcript indicates only that Mr. Sweeney was arrested on a bribery charge. The opinion of the Court of Appeals, however, does note that there was a narcotic charge (A 4).

defendants named in the conspiracy charge. Finding that, before such appointment, the trial court had been advised of the possibility of a divergence of interests between the two defendants, that, in fact, such conflict developed at the trial, and that counsel resolved such conflict by failing to do all he might in Glasser's defense, this Court reversed Glasser's conviction (315 U.S. at 72-76). In this case, however, there was no adverse interest that Mr. Sweeney was serving at the time he was supposed to be representing petitioner. He was not representing co-defendants whose interests conflicted—the situation in *Glasser* and other decisions relied upon by petitioner.[17] Nor had he represented, in another case, a witness against the defendant.[18] Nor was this a situation where trial counsel had represented the state in preliminary proceedings on the charge upon which he defended the accused at trial.[19]

What petitioner's contention really amounts to is that he had incompetent counsel; that his attorney, because of his personal difficulties, was not capable of representing him properly; and that for this reason the court should have granted him a further continuance to obtain other counsel. The circumstances set forth in the Statement are, we submit, an adequate answer. Petitioner's counsel had represented him

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[17] *Butzman* v. *United States*, 205 F. 2d 343 (C.A. 6) certiorari denied, 346 U.S. 828; *Craig* v. *United States*, 217 F. 2d 355 (C.A. 6).

[18] *District of Columbia* v. *Scott*, 214 F. 2d 860 (C.A. D.C.)

[19] *Berry* v. *Gray*, 155 F. Supp. 494 (W.D. Ky.).

for a considerable period of time and was thoroughly familiar with the case. There had been a number of continuances on petitioner's behalf. When the case was called for trial, two weeks after the attorney's arrest, petitioner did not appear with new counsel and ask for a continuance; he appeared with Mr. Sweeney and asked for more time to get new counsel. Under the circumstances the trial judge was justified in requiring the case to go to trial, giving petitioner the choice of using Mr. Sweeney or other counsel.

Furthermore, as the courts below held, the record shows that Mr. Sweeney conducted a vigorous defense in petitioner's behalf, both in cross-examining witnesses and in presenting affirmative evidence.

Petitioner relies upon two matters which, he claims, indicate that Mr. Sweeney's presentation was ineffectual. He contends, first, that counsel failed to make any demand under 18 U.S.C. 3500, for statements of government witnesses relating to their direct testimony (Pet. 25-26). But whether such demand should have been made was clearly a matter of trial strategy. Demanding production of statements and not using them would weaken, rather than aid, a defense. Secondly, petitioner asserts that counsel did not properly develop his defense of alibi, in that he sought to establish that petitioner was in New York at the time the illegal sale charged in count 5 was committed (on or about September 10, 1956) by introducing a letter from the manager of the hotel at which petitioner allegedly stayed, a document clearly inadmissible as hearsay and excluded as such, instead of making arrangements for the introduction of a deposition from

the manager of the hotel (Pet. 26-27). However, the original registration card showing petitioner's stay at the hotel, which was the best evidence, had been personally obtained by Mr. Sweeney in a trip to New York and was introduced into evidence on that point (T 363-364, 438).

In sum, an examination of the record shows that the courts below were warranted in concluding that "[t]he case was tried skillfully and adroitly on behalf of the defendant * * *" by Mr. Sweeney. (T 646; A 8-9).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be denied.

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